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No. 307

In the Supreme Court of the United States

OCTOBER TERM, 1966

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL POWER COMMISSION, UNITED GAS PIPELINE COMPANY, WILLMUT GAS AND OIL COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief of the Federal Power Commission in opposition to the petition for certiorari in this case and the petition for certiorari in the companion case ("Louisiana Gas Service Company, et al, Petitioners v. Federal Power Commission, Willmut Gas and Oil Company and United Gas Pipeline Company, Respondents" No. 308) represents a frantic effort to avoid review at this time of a fundamentally erroneous position taken by the Commission, as sustained by the Court of Appeals in this case. The Commission well knows that the import of the decision of the Court of Appeals, if allowed to stand, will be far reaching and indeed we believe that the Commission intends to employ the decision of the Court of Appeals, coupled with

a denial of certiorari, as a stepping stone to take over completely the regulation of rates for the sale of gas at wholesale within the producing state, except in such isolated instances where there is a separate intrastate pipeline.

I.

RESPONDENT'S FACTUAL ARGUMENT

The Commission, in its determination to avoid at all costs review of its position on this jurisdictional question at this time, has represented in its brief that it made a finding of fact as to the source of the gas involved, whereas actually that "finding" was not finally made by the Commission and was indeed repudiated by it in its opinion on rehearing. The "Question Presented" as stated in the brief of the Commission reads:

> "United Gas Pipe Line Company operates an extensive and integrated interstate gas pipeline system. Sales are made to various communities in Louisiana from lines physically laid in that State. *However, the Federal Power Commission found that on occasion a portion of the gas delivered to these communities crosses State lines.* The question presented is whether the sales from the integrated system to the Louisiana communities are subject to federal regulations under the Natural Gas Act." (Emphasis added) (Page 2 brief for the Federal Power Commission in Opposition)

A fair reading of the underscored portion is that the Commission found as a fact that all of the com-

munities involved at times received at least some gas from out of the state. The original opinion and order of the Commission (R. 365-382) could be construed as making such a finding. United Gas Pipeline Company so construed it and complained of such a finding in its Application for Rehearing before the Commission (R. 457-458). In response to this part of United's application, the Commission specifically disclaimed any such finding stating in its opinion and order denying rehearing:

> "United states we erred in finding that communities as far east as Slidell received offshore gas. We made no such finding. We simply were alluding to the testimony that such gas travelled toward Slidell, recognizing that the record does not indicate whether Slidell actually received offshore gas."
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> * * *
>
> "There is also the back-flow of Louisiana produced gas across the Mississippi-Louisiana border, i.e., gas from a point outside the state. Here again, the record fails to disclose which communities receive 'back-flow' gas or to what extent." (R. 473)

II.

RESPONDENT'S LEGAL ARGUMENTS

(A) "Integrated Pipeline"

The Commission in this case has introduced the concept of the "integrated" pipeline, with the idea that somehow an "integrated" pipeline in interstate commerce is subject to its jurisdiction as to all whole-

sales from the pipeline, but conceding that there may be a serious question as to whether this would be the case where the pipeline is not "integrated". (See page 6 and footnote 5 on page 8 of Brief for the Federal Power Commission in Opposition.)

It appears that the Commission has conveniently overlooked a position taken by it previously, as sustained by the courts, that the size or integration of the operations of a producer selling gas for resale in interstate commerce is not determinative of whether the Commission has jurisdiction over those sales. See "*In the Matter of Saturn Oil & Gas Company, Inc.*", 16 FPC 461 (1956); aff'd. *Saturn Oil & Gas Company v. Federal Power Commission*, 250 F.2d 61 (10th Cir. 1957); cert. den. *Saturn Oil & Gas Company, Inc. v. Federal Power Commission*, 355 U.S. 956, 78 St. Ct. 542, ____ L.ed ____ (1958). In that case, the Commission successfully persuaded the Court of Appeals for the Tenth Circuit that:

> "There is nothing in that Natural Gas Act which makes its applicability depend on the size or the integration of the gas operator." (p. 67)

There is certainly at least some lack of consistency between the position taken by the Commission in this case and that successfully taken by it in the *Saturn* case.

(B) Other Legal Questions That May Be Involved.

The Court of Appeals specifically declined to reach the question of whether the presence of gas from points offshore from Louisiana had any bearing on the

jurisdictional issues involved. The Commission apparently is of the view that the possibility that offshore gas might be used in part and at times to serve the communities involved leaves no question but that Commission jurisdiction must be sustained as to the sales to those communities. This, however, ignores two substantial legal questions not reached by the Court of Appeals, namely: (1) whether commerce between a point within the Federal domain offshore from Louisiana and a point within Louisiana is "interstate commerce" within the meaning of the Natural Gas Act, in view of the treatment of the offshore area in the Outer Continental Shelf Lands Act as being considered equivalent to an area of Federal domain located within a state. (2) Even if the gas produced offshore be considered as produced outside Louisiana, whether the sale for resale in Louisiana of less than the proportion of the Louisiana-produced gas in the pipeline should be considered a sale in interstate commerce under the Natural Gas Act, in view of *Peoples Gas Co. v. Public Service Commission*, 270 U.S. 550, 46 S. Ct. 371, 70 L.ed 726 (1926) (see pages 9-11 of petition for ceriorari on behalf of Louisiana Public Service Commission), and the suggestions of this court in *California v. LoVaca Gathering Co.*, 379 U.S. 366, 85 S. Ct. 486, 13 L.ed 2d 357 (1965) and in the concurring opinion in *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687, 85 S. Ct. 632, 13 L.ed 2d 605 (1965) with respect to allocation as between jurisdictional and non-jurisdictional uses based upon proportions of gas available and used.

CONCLUSION

For the reasons stated above, as well as those stated in the petition for certiorari in this case and the companion case, petitioner prays that both petitions for certiorari be granted.

September, 1966.

Respectfully submitted,

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B-693, 9-66